Supreme Court, U.S.
FILED

No. _____ 991288 DEC 9 = 1999

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In the
SUPREME COURT OF THE UNITED STATES

October Term 1999

DANNY OWENS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

On Petition For Writ of Certiorari to The
United States Court of Appeals
For the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Lompoc, Ca. 93436

23PP

QUESTIONS PRESENTED

1. Where the rules providing for the seizure of real property are clearly in violation of the Due Process Clause, may a district court validly accept jurisdiction over the property pursuant to them?

2. May courts of appeals make hindsight determinations, ab initio of the existence of exigent circumstances necessary to justify a seizure without prior notice ?

3. Does this Court's Degen decision allow district courts to erect procedural bars to a victim of an illegal seizure from receiving lost rents and profits resulting from an unconstitutional seizure of his property?

PARTIES TO THE PROCEEDING

All of the parties to this proceeding are listed in the style of this case.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1999

DANNY OWENS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Danny Owens respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., infra, la-4a) was not published.

JURISDICTION

The court of appeals entered its judgment on September 15, 1999. The jurisdiction of this Court is involved under 28 U.S.C. §1254.

STATUTORY PROVISIONS INVOLVED

Clause (b) of Rule 39 of the Federal Rules of Civil Procedure provides that : "but, notwithstanding the failure of a

party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion may order a trial by a jury of any or all issues".

Rule C of the Supplemental Rules For Certain Admirality and Maritime Claims states: "In actions by the United States for forfeitures for federal statutory violations, the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the vessel or other property without requiring a certificate of exigent circumstances."

Rule E of the Supplemental Rules for Certain Admirality And Maritime Claims, at clause (4) (b) states: " If tangible property is to be attached or arrested, the Marshall or other person or organization having the warrant shall take it into possession for safe custody."

Clause (f) of Rule E, Supra, states: Procedure for Release From Arrest or Attachment. Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief

granted consistent with these rules".

STATEMENT

In November of 1991, Respondent seized by warrant several video poker machines, cash, and records from Petitioner"s home and businesses. From that point on no more illegal conduct was alleged to have occurred at those locations. In September of 1992, however, Respondent seized Petitioner"s home and businesses and evicted the tenants thereon, closing the businesses. Requests by Petitioner to permit the businesses to continue were denied.

Only days after the seizures of Petitioners' properties , the district court stayed Respondent's forfeiture proceedings pending the outcome of criminal proceedings against Petitioner. In fact, this stay continued for over three years, all the while Petitioner was denied access to his businesses. The businesses remained closed.

Finally, after several years and Petitioner's conviction in federal court, the district court lifted the stay and entered a discovery/motions schedule. Petitioner's attorney withdrew from

the case, however, and no motions on Petitioner's behalf were made regarding the illegality of the seizures in light of this Court's interim decision in United States v. James Daniel Good, 510 U.S. 43 (1993).

About this time also, the district court judge in the case was replaced by a new one. After several changes in counsel, Petitioner filed two motions which give rise to the instant litigation. First, Petitioner filed a motion for a jury trial, since the original attorney had not done so previously. Second, Petitioner filed a motion for a post-seizure hearing for release of his property/ dismissal return of rents. The district court denied both motions.

After denying Petitioner's motion, the district court proceeded to try this case without a jury and without having determined the legitimacy of Respondent's seizure in light of this Court's decision in Good, supra. Because of the blatant violation of Petitioners' rights he filed an emergency petition for mandamus with the court below. That was denied as well. Petitioner then boycotted the trial and left his fate to an appeal. That was also futile, for the court below affirmed the district court's decision.

In sum, Respondent seized Petitioners' businesses in violation of the Due Process clause, stayed the proceedings so that Petitioner could not challenge those seizures , then took that land without even a jury trial.

REASONS WHY THIS PETITION SHOULD BE GRANTED

The decision below represents a departure from established precedent of this Court and creates a further split in the courts of appeals on an important issue of procedure.

MAY DISTRICT COURTS VALIDLY ACCEPT JURISDICTION OVER REAL PROPERTY PURSUANT TO THE PROCEDURES OUTLINED IN RULES C AND E OF THE RULES FOR CERTAIN ADMIRALITY AND MARITIME CLAIMS?

The decision in Good, supra, holds that seizures without prior notice and an opportunity to be heard violate the Due Process Clause of the Fifth Amendment. The scheme for seizures outlined under Rules C and E of the Supplemental Rules clearly require seizures of real property without such an opportunity, and that is exactly what happened in this case.

Rule C of the Supplemental Rules requires the "clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for arrest of the ...property without requiring a certificate of exigent circumstances. " This is exactly the procedure that was used here, and now showing of exigent circumstances was ever made.

Rule E (b) requires the Marshall to take this warrant issued by the clerk and arrest the property. That is exactly what the Marshals did in this case . They arrested the property and evicted every tenant in it.

Good , supra , however established about two years after the seizures in this case that there must be prior notice and a hearing before the seizure of real property, unless there is a showing of exigent circumstances. Accordingly, the seizures in this case clearly violated Good but not the Supplemental Rules.

District courts derive their substantive and procedural jurisdiction from the rules established by Congress, provided that those rules do not violate the Constitution. Here, the rules established for taking jurisdiction over real property in forfeiture

cases violates the Due Process Clause, as Good so held.

The court below determined that as long as the district court had actual control over the property, it had jurisdiction. The unconstitutionality of the means by which that jurisdiction was obtained, it said, was of no consequence.

As it now stands, the Supplemental Rules mandate a procedure which violates the Constitution. That unconstitutional procedure was used to deprive Petitioner of his property, and the court below refused to correct this.

This Court needs to review that decision and establish the invalidity of the Supplemental Rules as applied to real property.

MAY COURTS OF APPEALS MAKE HINDSIGHT DETERMINATIONS OF THE EXISTENCE OF EXIGENT CIRCUMSTANCES ?

The court below made a factual finding that exigent circumstances existed in this case to justify the seizure of Petitioner's property without prior notice and a hearing. No such finding was ever made before the seizures or after them in the district court. Based solely on arguments in Respondent's brief on

appeal , the court of appeals determined that extra ordinary circumstances existed warranting the actions in this case. This decision countenances a procedure that is squarely at odds with this Court's decision in Good , and the decisions of every other court of appeals to consider it . It is ridiculous to say, as the court below did, that such factual determinations could or should be made by the hindsight judgment of the courts of appeals, much less the hindsight judgments of the district courts. The decision of whether or not exigent circumstances exist should be made before the warrant of arrest is issued. However, Supplemental rule C mandates the clerk - not a judge - to issue the warrant without a certificate of exigent circumstances.

This situation is simply out of hand. Petitioner was never given a meaningful opportunity to challenge the court of appeals finding of exigent circumstances, and unless this Court grants certiorari, he never will. Yet he lost over 4 Million Dollars worth of real estate because of it .

The court below also found that Petitioner had somehow waived his right to challenge the illegal seizures in this case. In

fact, Petitioner not only asked for return of his property in his original answers, he filed a separate civil suit challenging those seizures. The suit was dismissed because of the pendency of the forfeiture proceedings, and the challenge in the answers was simply ignored. Moreover, this Court has clearly held in Degan v. United States, 517 U. S. 820, 827 (1996) that such a right should not be deemed w

aived. Lesser sanctions should have been considered for any perceived delay in Petitioner's actions.

Thus, the court's finding of waiver could not support its refusal to remedy Petitioner's loss. That's why it went on to find, hindsight, exigent circumstances. The whole proceeding smacks of illegality and cover-up. It is sad that our Justice System has come to this.

The Court below admitted that Petitioner was entitled to reimbursement for all the lost rents and profits as a result of any unlawful seizure of his property. It went outside the decisions of this Court, and other Courts of Appeals, however, to find a reason not to give Petitioner his due. In so doing, the court below has

established precedent for other courts to make hindsight determinations of factual exigencies which this Court clearly required to be made before any seizure takes place. It also established the erosion of this Court's decision in Degan requiring lesser sanctions where substantial rights could be lost for minor procedural defaults. In Degan , this Court remanded in just such as case as this, and on remand, Degan was afforded complete relief even though he refused to show up for court. How could Petitioner then lose his right to compensation for simply failing to specify timely his challenge to the violation of his property rights?

CONCLUSION

To correct the clear error of the lower court, remedy the split created by that error, and compel adherence to this Court's precedent, this Court should grant this petition.

RESPECTFULLY REQUESTED,

_____

DANNY M . OWENS

No. 98-5316

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee,)
)ORDER
v.)
)
ONE 1990 CADILLAC, One 1990)
Cadillac Allante, VIN 1G6VS3382)
LU125939, with All Appurtenances) **NOT RECOMM-**
Thereon; et al.,)**ENDED FOR FULL-**
)**TEXT PUBLIC-**
) **ATION**
Defendants,)
)Sixth Circuit Rule 206
DANNY MCGEE OWENS,)Limits citation to spec-
)ific situations Please see
Defendant-Appellant.)Rule 206 before citing
)In a proceeding in a court
)In the Sixth Circuit. If
)Cited , a copy must b e
)Served on other parties
and
)The Court.
)This notice is to be
)Prominently displayed
)If this decision is re-
)Produced.

Before: GUY, RYAN, and MOORE, Circuit Judges

Danny McGee Owens appeals a district court order forfeiting the defendant property to the government in these consolidated civil forfeiture actions filed under 18 U.S.C. 984 and 1955 and 21 U.S.C. § 881. The case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In 1994, a jury convicted Owens of: 1) conspiracy to operate an illegal gambling business, to use facilities in interstate commerce in aid of racketeering, to conceal the nature of an interstate prostitution enterprise by laundering money , and to conceal the nature of an interstate gambling enterprise by laundering money in violation of 18 U.S.C. § 371;2)operation of an illegal gambling business in violation of 18 U.S.C., § 1955, and 3) money laundering in violation of 18 U.S.C. § 1956(a)(1). The district court sentenced Owens to 327 months of imprisonment and the court imposed a $500,000 fine. On appeal, this court affirmed his convictions and sentence. *United States v. Owens*, 159 F.3d 221 (6th Cir. 1998).

Prior to Owens's convictions, the government filed 17 separate actions seeking the forfeiture of several parcels of Owens's real property, as well as currency and numerous items of personal property including vehicles, computer equipment, and video gaming machines. These actions were consolidated and eventually proceeded to a bench trial. After the government established probable cause for the forfeiture and Owens put forth no defense, the district court ordered the defendant property forfeited to the government. In this timely appeal, Owens argues that: 1) the district court lacked jurisdiction over the defendant property, 2)the district court improperly denied his request for a pretrial hearing; and 3) the district court improperly denied his motion for a jury trial.

Upon review, we conclude that the district court had jurisdiction over the defendant property in this case. A civil forfeiture proceeding is an action in rem against the property itself and the court's jurisdiction derives entirely from its control over the defendant res. See *United States v. One 1987 Jeep Wrangler*, 972 F. 2d 1428, 1435 (11th Cir. 1991) (en banc). The record

reflects that the court had control over the defendant property and, indeed, Owens does not assert that the district court lacked control over the property. While Owens argues that the court lacked jurisdiction because the initial seizure of the property did not comport with due process, he has not established how any failure to provide due process deprived the court of jurisdiction.

Owens's argument that the district court improperly denied his request to hold an evidentiary hearing is without merit. Owens argues that the court should have held a hearing to determine if his due process rights were violated when his property was seized. In support of his due process argument, Owens cites to the Supreme Court's decision in *United States v. James Daniel Good Real Property*, 510 U. S. 43 (1993). Although Owens's property was seized prior to the *Good* decision, Owens did not file his motion to dismiss relying on *Good* until February 4, 1998, approximately three weeks before the scheduled trial date and well after the expiration of the motions deadline set by the district court. The district court determined that Owens had failed to raise this issue in a timely manner and declined to rule on the issue.

Owens's failure to raise this argument at an earlier opportunity constitutes a waiver of the challenge. *See United States v 8136 S. Dobson St.*, 125 F. 3d 1076, 1086-87 (7th Cir. 1997), *cert denied*, 118 S. Ct. 1686 (1998). Further, the district court held its bench trial within a month after Owens filed his motion and the court determined that probably cause existed to forfeit the defendant property. The promptness and adequacy of the later proceeding reflects that the court properly denied Owens's motion. See *United States v. Real Property Located at 1184 Drycreek Rd.*, ____ F. 3d ___, ___, 1999 WL235892, at *10(6th Cir. Apr. 23, 1999).

Even if Owens had properly presented his due process claim to the district court, his challenge lacks merit. In *Good*, 510 U.S. at 54, the Supreme Court concluded that, absent exigent circumstances, the Due Process Clause requires the government to provide notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture. It is undisputed that the government did not provide Owens with these due process protections prior to the seizure of the property. Although the

government's seizure of Owens's property in this case predated the *Good* decision , its analysis still applies because this case was pending at the time of the decision. *See Real Property Located at 1184 Drycreek Rd.*, 1999 WL235892, at *6. Where the government does not provide pre-deprivation notice and a hearing but the property subsequently is found to be subject to forfeiture, the violation does not immunize the property from forfeiture but the government is responsible for rents and profits of which the claimant was deprived during the period of illegal seizure. *See id.*, 1999 WL235892, at *7

However, exigent circumstances existed in this case which justified the immediate seizure of the property without providing notice and an opportunity to be heard. To demonstrate exigent circumstances, the government must show that less restrictive measures, such as lis pendens, a restraining order, or a bond, would not suffice to protect the government's interest in preventing the sale, destruction, or continued unlawful use of the property. *See Good*, 510 U.S. at 62; *Real Property Located at 1184 Drycreek Rd.*, 1999 WL235892, at *8-9. In this case, the threat

of the continued unlawful use of the property required its immediate seizure. At Owens's criminal trial, extensive testimony was presented that he used several topless clubs as locations for conducting prostitution, illegal gambling, and drug trafficking. In light of the ram pant illegal activity being conducted at these clubs, the government's immediate seizure of the property was justified to prevent the continued unlawful use of the property.

Lastly, the district court property denied Owens's motion for a jury trial. In February 1998, Owens moved the court for a jury trial, but the court denied his motion as untimely. A party must demand a jury trial within ten days of the last pleading or the right is deemed waived.

See Fed. R. Civ. P. 38(d); *Moody v. Pepsi-Cola Metro. Bottling Co.*, 915 F. 2d 201,207 (6th Cir.1990). Under Fed. R. Civ. P. 39(b) , the court, in its discretion and upon a party's motion, may order a trial by a jury on any and all issues. The district court has broad discretion in ruling on a Rule 39(b) motion and the court will not abuse its discretion in denying the motion if the only justification is mere inadvertence. *See Misco, Inc. v. United*

States Steel Corp., 784 F. 2d 198, 205 (6th Cir. 1986). We conclude that the district court did not ab use its discretion in denying Owens's motion.

Accordingly, this court affirms the district court's judgment. Rule 34(j)(2)(C), rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

Leonard Green

Clerk